

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STEVE D'AGUIAR,

Plaintiff,

v.

RICHARD W. HEISLER,

DEBORAH J. HEISLER, and

BRIGHTERSIDE HOME INSPECTION,
INC.

Defendants.

CA. No. CPU4-09-005285

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Pro se Defendant

**MEMORANDUM OPINION AND ORDER
ON COMPLAINT OF PLAINTIFF STEVE D'AGUIAR**

Submitted: November 10, 2011

Decided: December 15, 2011

DAVIS, J.

This is an action, in the alternative, for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional or fraudulent misrepresentation, fraudulent concealment, and negligent misrepresentation in violation of the Consumer Fraud Act. The

action between Steve D’Aguiar and Richard W. Heisler and Deborah J. Heisler arises out of a real property sales agreement between Mr. D’Aguiar and the Heislrs. The action between Mr. D’Aguiar and Brighterside Home Inspection, Inc. (“BHI”) arises out of a home inspection performed by BHI prior to closing on the real property sale agreement between Mr. D’Aguiar and the Heislrs. On October 5, 2011, the Court of Common Pleas held a civil trial on the complaint (the “Complaint”) filed by Mr. D’Aguiar. This is the Court’s Memorandum Opinion and Order in connection with the relief sought in the Complaint. For the following reasons set forth below, the Court is entering judgment in favor of Mr. D’Aguiar.

I. General Procedural Background

On July 6, 2009, Mr. D’Aguiar filed an action for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional or fraudulent misrepresentation, fraudulent concealment, and negligent misrepresentation in violation of the Consumer Fraud Act against the Heislrs and BHI. On September 15, 2009, Mr. Heisler answered the Complaint. On January 21, 2010, BHI sent a letter to the Court, but did not answer the Complaint. On December 2, 2010, Mrs. Heisler answered the Complaint.

On December 22, 2010, Mr. D’Aguiar filed a motion seeking entry of a default judgment (the “Motion for Default Judgment”) against BHI. On January 21, 2011, the Court granted the Motion for Default Judgment, entering a default judgment against BHI. The Court then scheduled a hearing pursuant to Court of Common Pleas Civil Rule 55(b)(2) to determine the amount of damages, if any, Mr. D’Aguiar was entitled to with respect to BHI.

On October 5, 2011, the Court held a trial and damages hearing. The Court heard testimony from five witnesses – Mr. D’Aguiar and Diego Mosquera on behalf of the plaintiff and

Robert Vickery, Mr. Heisler, and Mrs. Heisler on behalf of the defendants. The Court admitted seven documents and one package of photographs¹ into evidence at trial.

At the conclusion of the plaintiff's case in chief, the defendant moved for a directed verdict. The Court denied defendant's motion for directed verdict. At the conclusion of the trial, the Court ordered post-trial memoranda from the parties in lieu of closing arguments. The Court also ordered counsel for Mr. D'Aguiar to discuss in her memorandum whether, and to what extent, the Court is bound by the limitation of liability clause in the home inspection contract between BHI and Mr. D'Aguiar.

II. Facts

Mr. D'Aguiar testified that he first met Mr. Heisler when he was shopping for a new home. Mr. D'Aguiar stated that he saw a "for sale" sign at 49 Loblolly Lane, Middletown, Delaware 19709 ("49 Loblolly Lane"), knocked on the door and Mr. Heisler answered. Mr. D'Aguiar said that he told Mr. Heisler he was interested in buying 49 Loblolly Lane. Mr. Heisler told Mr. D'Aguiar that he should wait "a couple of months" to buy the home because, according to Mr. D'Aguiar, Mr. Heisler had an existing contract with a real estate agent and wanted to sell the home after the real estate listing contract expired. Mr. D'Aguiar did not enter or inspect 49 Loblolly Lane at this time.

Mr. D'Aguiar testified that Mr. Heisler later called him to see if he was still interested in buying the home. Mr. D'Aguiar indicated that he was still interested. Shortly after this phone call, Mr. D'Aguiar and his wife then visited 49 Loblolly Lane. Mr. Heisler was present during this visit. Thereafter, Mr. D'Aguiar began negotiations with Mr. Heisler to purchase 49 Loblolly Lane.

¹ The entire package of photographs was admitted into evidence as Joint Exhibit # 5.

a. The Seller's Disclosure Form and the Agreement

On November 22, 2006, the Heislars completed and signed the "Seller's Disclosure of Real Property Condition Report" ("Seller's Disclosure Form").² The Heislars answered the following relevant questions as stated:

38. Are there any drainage or flood problems affecting the property? [No]

47. Is there any movement, shifting, or other problem with walls or foundations? [No]

51. Is there any past or present water leakage in the house? [Yes]

53. Are there any repairs or other attempts to control the cause or effect of any of the problem[s] described above? [Yes]

59. Does the property have a sump pump? [No]

60. Is there any water leakage, accumulation, or dampness in the basement or crawlspace? [No]

61. Have there been any repairs or other attempts to control any water or dampness problem in the basement or crawlspace? [Yes]

62. Are there any cracks or bulges in the floor or foundation walls? [Yes]³

Also relevant here is page five of the Seller's Disclosure Form. Page five provides: "[i]f you have indicated there is a problem with any of the preceding items, please provide a detailed explanation below."⁴ With respect to questions 51, 53 and 61, the Heislars answered: "[r]erouted down spout at front of house near garage."⁵ With respect to question 62, the Heislars explained that there were "[s]mall cracks in basement walls."⁶

² Joint Exhibit # 1.

³ Joint Exhibit # 1.

⁴ Joint Exhibit # 1.

⁵ Joint Exhibit # 1.

⁶ Joint Exhibit # 1.

Mr. Heisler testified during the defendant's case in chief. Mr. Heisler testified that although both he and his wife signed the Seller's Disclosure Form, he prepared the form alone. Mr. Heisler admitted that he answered question 51 in the affirmative because when he filled out the Seller's Disclosure Form water still seeped in through the walls of the basement. Mr. Heisler went on to testify that he thought water seeping through the walls was normal.

On cross-examination, Mr. Heisler again admitted that he observed water seeping through the walls closely before he filled out the Seller's Disclosure Form. Further, Mr. Heisler admitted that he knew there were cracks in the basement wall when he filled out the Seller's Disclosure form. Mr. Heisler nonetheless argued that he did not think he needed to answer question 47 in the affirmative because he disclosed this issue by supplementing the response to question 62 with: there were "[s]mall cracks in the basement wall."⁷ Mr. Heisler also testified that the supplemental response to question 62 was limited to the cracks in the basement walls and did not address a "bulge" in the basement walls. Mr. Heisler did admit that he did not disclose that there was a bulge in one of the basement walls on the Seller's Disclosure Form despite knowing such bulge existed when he filled out that form.

On December 1, 2006, Mr. D'Aguiar signed the Seller's Disclosure Form, acknowledging the following:

I am relying upon the above report and statements within the sales contract as representative of the condition of property, and not relying upon any other information about the property.

I have carefully inspected the property. I acknowledge that Agents are not experts in detecting or repairing physical defects in property.

I understand there may be areas of the property of which Seller has no knowledge and this disclosure statement does not encompass those areas.

...

⁷ Joint Exhibit # 2 at DAG00255.

I have read and received a signed copy of this report.

I may negotiate in my agreement of sale for other professional advice and/or inspections of the property.

...

This is a legally binding document. If not understood, consult an Attorney.⁸

At trial, Mr. D'Aguiar admitted that he looked at the Seller's Disclosure form. Mr. D'Aguiar did admit, however, that he did not closely review or understand the document when he signed it.

On December 1, 2006, Mr. D'Aguiar agreed to purchase 49 Loblolly Lane from the Heislars for \$315,000.00.⁹ The agreement of sale included a property inspection contingency.¹⁰ The parties set January 5, 2007 as the closing date.¹¹ Further, the agreement required that the Heislars install a sump pump prior to settlement.¹² Mr. Heisler testified that he bought the sump pump himself and paid a friend to install it.

Before the parties signed the agreement of sale on December 1, 2006, Mr. D'Aguiar inspected the property, including the basement. Mr. D'Aguiar testified on cross-examination that there was not much "stuff" in the basement at this time. The only things in the basement were a homemade wooden shelf, some swimming pool supplies, paint cans, and a can of dry lock. On cross examination, Mr. D'Aguiar denied that there were any other items in the basement, such as a couch, chest, and cardboard boxes. Mr. D'Aguiar testified that the homemade shelf sat against the wall and there were no water stains on the shelf. Mr. D'Aguiar testified that the walls were not painted.

Mr. Heisler testified that he told Mr. D'Aguiar -- while Mr. D'Aguiar was inspecting the basement -- that there was a "bow" in one of the basement walls that caused the wall to

⁸ Joint Exhibit # 2.

⁹ Joint Exhibit # 1.

¹⁰ Joint Exhibit #1.

¹¹ Joint Exhibit # 1.

¹² Joint Exhibit # 1.

physically bulge inward. Further, Mr. Heisler testified he told Mr. D'Aguiar that when he first purchased the property, he observed some flooding in the basement. However, Mr. Heisler testified that he informed Mr. D'Aguiar that he corrected this problem by moving the down spout away from the home and building landscaping to move water away from the home. Mr. Heisler further testified that he told Mr. D'Aguiar that, since moving the down spout and adding corrective landscaping, the basement only flooded during a hurricane that occurred sometime around the year 2000.

b. The Home Inspection

On December 11, 2006, Robert Vickery performed a pre-closing home inspection of 49 Loblolly Lane. At the time, BHI employed Mr. Vickery as a home inspector. Mr. Heisler was present for the entire home inspection. Mr. D'Aguiar arrived late and estimated that he was present for the final forty-five minutes of Mr. Vickery's inspection.

Testimony at trial provided that Mr. D'Aguiar hired BHI to do the home inspection of 49 Loblolly Lane. The parties admitted the contract between Mr. D'Aguiar and BHI (the "Home Inspection Contract"). Under the Home Inspection Contract, BHI agreed to inspect 49 Loblolly Lane for a fee of \$405.00. The Home Inspection Contract contains a limitation of liability provision that provides: "[t]he client agrees to limit any claim of liability for personal injury or property damage caused by the negligence of the Company or its agents to two times the amount of the original inspection fee."¹³

Mr. D'Aguiar testified that he arrived at 49 Loblolly Lane for the inspection at around 6:00 p.m. Mr. Vickery and Mr. Heisler were in the back yard of the property looking at the septic tank. Then they went into the basement. Mr. D'Aguiar testified that Mr. Vickery did not say

¹³ Joint Exhibit # 3 at DAG0081.

anything about water, and repeatedly said that the house was well built. Mr. D’Aguiar testified that he, Mr. Heisler and Mr. Vickery were in the basement for approximately five minutes. Mr. D’Aguiar further testified that while no lights were on in the basement at this time, it was light outside, so he was able to fully observe the basement walls and floor. Mr. Heisler testified during the defendant’s case in chief that the basement lights were on during the inspection.

The Heislars called Mr. Vickery as a witness during their case in chief. Mr. Vickery testified that he has worked as a home inspector since 1998. Mr. Vickery received training in home inspections at the National Association of Home Inspectors. He is certified “CR-1” in home inspection.¹⁴ Mr. Vickery testified that his usual practice when conducting a home inspection is to examine the entire interior and exterior of the home. Mr. Vickery stated that during the inspection he tests all the “systems” and appliances in the home. Then, Mr. Vickery said he reviews the inspection report with the client – the buyer. Mr. Vickery testified that he followed this standard practice when he performed the home inspection of 49 Loblolly Lane.

Mr. Vickery testified that on the day of the inspection, Mr. D’Aguiar was about two hours late to the inspection. Mr. Vickery testified that when he examined the basement he noticed efflorescence¹⁵ on the concrete cinder block walls, and that he noticed the bulge in the wall. However, Mr. Vickery testified that the Heislars disclosed the bulge in the wall, so this was not a problem. Mr. Vickery also testified that he did not observe any stains on the floor of the basement or the wooden shelves that would indicate that there was a major water problem in the basement.

¹⁴ Mr. Vickery testified that a “CR-1” home inspector is a type of certification awarded by the National Association of Home Inspectors. More specifically, this certification is one level higher than general home inspector certification.

¹⁵ See *infra* at n. 33.

Further, Mr. Vickery testified that he, Mr. Heisler, and Mr. D'Aguiar were in the basement for approximately forty-five minutes during the home inspection. Mr. Vickery testified that they discussed the floor, walls, and the bulge in the wall. Nonetheless, at the conclusion of Mr. Vickery's direct testimony, he indicated that he did not believe that there were any "red flags" present in the basement at the time of the home inspection.

On cross-examination, Mr. Vickery admitted that he indicated in the report that there was no water damage or settlement cracks in the basement.¹⁶ Mr. Vickery also admitted that he did not include that there was a bulge in the basement wall in his report. Mr. Vickery explained that he did not do so because he knew that the Heislars included this information in their Seller's Disclosure Form.

Mr. Heisler testified that he was present during the home inspection. He testified that while he, Mr. D'Aguiar, and Mr. Vickery were in the basement, he disclosed everything to Mr. D'Aguiar, including that there was a bulge in the wall, the flooding issues that occurred before the down spout was corrected and the landscaping changed, and the flooding that occurred during the hurricane.

At the conclusion of the defendant's case in chief, the plaintiff recalled Mr. D'Aguiar as a rebuttal witness. He again testified that Mr. Vickery never said anything about the bulge in the wall and that Mr. Heisler did not mention, during the inspection, that he ever had any water problems in the basement.

c. Water Problems in the Basement

On January 4, 2007, the Heislars and Mr. D'Aguiar closed on the sale of 49 Loblolly Lane. Mr. D'Aguiar moved into the home about one week later.

¹⁶ Joint Exhibit # 3 at DAG0087.

Mr. D'Aguiar testified that he first discovered water problems about one month after he moved into the home. There were holes in the basement floor to allow for installation of a bathroom in the basement. Mr. D'Aguiar testified that when it first rained, these holes filled with water, water seeped through certain portions of the wall, water ran down other portions of the wall and the sump pump did not work. Mr. D'Aguiar testified that the flooding was so significant that he needed to use a "shop vac" to clean up the mess. Mr. D'Aguiar testified that he called Mr. Heisler twice to ask about this issue. Mr. D'Aguiar testified that on both occasions Mr. Heisler denied ever experiencing water problems during the time he lived at 49 Loblolly Lane.

Mr. Heisler testified during his case in chief that Mr. D'Aguiar called him only once, asked about water in a hole in the basement floor left open for indoor plumbing, became frustrated, and hung up. Mr. Heisler testified that he later tried to call Mr. D'Aguiar to follow up, but that "he wouldn't take any calls."

Mr. D'Aguiar introduced photographs into evidence to supplement his testimony.¹⁷ Mr. D'Aguiar testified that he took these photographs on April 25, 2007. Photographs 1, 2, 4, 5, 6, 20, and 22 show various portions of the basement floor.¹⁸ Mold, cracks, and water stains are visible in the photographs. Photographs 3, 7, 15, and 18 show various portions of the basement wall.¹⁹ In these photographs, portions of the wall are stained and other portions are discolored. Photographs 9, 11, 12, and 14 all show one portion of the basement wall.²⁰ Certain portions of the mortar holding the bricks together are significantly darker than the rest of the mortar in the wall. Mr. D'Aguiar testified that he believed that the Heislars attempted to repair and/or hide cracks in the mortar by applying a fresh layer of mortar over the cracks. Photographs 9, 11, 12,

¹⁷ Joint Exhibit # 5.

¹⁸ Joint Exhibit # 5.

¹⁹ Joint Exhibit # 5.

²⁰ Joint Exhibit # 5.

and 14 also show that certain portions of the wall are severely discolored and or stained.²¹ Photographs 13, 21, and 23 show cracks in both the bricks and the mortar making up the back wall of the basement.²² Photographs 8, 9, and 24 show the edge of the floor where the floor and one of the basement walls meet. This edge is discolored with dark brown, black, and white stains.²³

Mr. Heisler testified that he and his wife purchased 49 Loblolly Lane in 1997. Mr. Heisler testified that when they moved in, they initially had some problems with water in the basement. However, Mr. Heisler testified that he discovered the water problems were caused by a down spout that emptied the water from the gutters too close to the home. Mr. Heisler testified that he re-routed the down spout farther away from the home, and only experienced one more instance of flooding after doing so.

Mr. Heisler testified the only other time he observed flooding in the basement was sometime around 2000, during a hurricane. Mr. Heisler testified that during the hurricane, water “cascaded down the walls,” but he was able to clean it up immediately with a “shop vac.” Mr. Heisler testified that there were never any problems with water in the basement after the hurricane. He testified that he and his wife stored a variety of items of personal property on the floor of the basement including cardboard boxes containing income tax records, a white couch and a “hope chest.” Mr. Heisler testified that he never noticed wetness, dampness or stains on any of these items.

Mrs. Heisler briefly testified during defendant’s case in chief. Specifically, she testified that the basement was “dry” after the hurricane, the couple kept a significant amount of personal

²¹ Joint Exhibit # 5.

²² Joint Exhibit # 5.

²³ Joint Exhibit # 5.

property in the basement, and when they moved out, none of these items were water damaged. However, on cross-examination, Mrs. Heisler admitted that she moved out of the home about a year before they sold the home to Mr. D'Aguiar. Mrs. Heisler also testified that she had not returned to 49 Loblolly Lane since she moved out. Further, she did not help Mr. Heisler sell the home in any way beyond signing the Seller's Disclosure Form, the Agreement of Sale, and the documents at closing.

d. Basement Repairs and Restoration

Mr. D'Aguiar testified that he was concerned about the water problem, so he called three companies advertised as residential basement restoration and waterproofing specialists. Each company visited 49 Loblolly Lane, observed the damage, and provided Mr. D'Aguiar with an estimate. The estimates were for \$9,800.00, \$18,967.00, and \$23,000.00.

Mr. D'Aguiar testified that he did not hire the company that provided the \$9,800.00 estimate because when the estimator came to 49 Loblolly Lane, he came with a “dumptruck and wheelbarrow,” wrote down the estimate by hand on a blank piece of paper, and did not offer a lifetime warranty.²⁴

Mr. D'Aguiar testified that Mid-Atlantic Waterproofing (“MAW”) provided an \$18,967.00 estimate for remediating the basement. Mr. D'Aguiar stated he hired MAW because MAW appeared to be professional, knowledgeable, and their work was backed by a “two-lifetime warranty” that D'Aguiar could pass on to the next owner of the home if he sold it. On April 30, 2007, Mr. D'Aguiar and MAW signed a written agreement to this effect.²⁵ The written agreement included a document titled “Service Warranty.” This document provides that the wall

²⁴ Defendant's Exhibit # 1.

²⁵ Plaintiff's Exhibit # 2.

repairs are covered by a service warranty for the entire period in which the owner holds title to the property, and that the agreement is transferable to subsequent purchasers of the home.²⁶

Mr. D'Aguiar testified that MAW came to 49 Loblolly Lane and began the repairs and restorative work about one week later. While MAW was performing the work, Mr. D'Aguiar took more pictures. Photograph 48 shows portions of the wall, the door exiting the basement, and parts of the French drain that were exposed after MAW dug up portions of the floor and drilled holes in the wall.²⁷ There are visible black stains on the wall, and water flowing out of a hole in the wall. Photographs 10, 16, and 17 shows the sump pump the Heislars installed as required by the December 1, 2006 agreement of sale. The remaining photographs show MAW employees performing the contracted work, exposed portions of the original French drain that was installed in the home when it was built, and a large amount of water pouring out of holes drilled in the wall and pooling on the basement floor.²⁸ Mr. D'Aguiar testified that it did not rain during the weekend that MAW performed this work.

Mr. D'Aguiar testified that MAW drilled the holes in the basement wall to relieve pressure on the walls caused by water that had accumulated behind the walls. He testified that this accumulation was so significant that it caused the basement wall to "bow out." In other words, the water physically pushed the wall inwards. To correct this problem, Mid Atlantic drilled the holes to drain the water, and installed five carbon fiber strips behind the wall to prevent the wall from "bowing out" further in the future. Finally, Mr. D'Aguiar testified that since MAW performed this work, he has not experienced any water related issues at 49 Loblolly Lane.

²⁶ Plaintiff's Exhibit # 2 at pp. DAG00125.

²⁷ Joint Exhibit # 5.

²⁸ Joint Exhibit # 5 at 26-30, 32- 47, 49.

Mr. D'Aguiar called Diego Mosquera to testify about the work that was performed by MAW at 49 Loblolly Lane. Mr. Mosquera has been employed by MAW for 20 years in various positions. Currently, he is employed as a corporate regional manager. Mr. Mosquera testified that MAW specializes in basement waterproofing, and that he personally has been involved in the waterproofing of over twenty-five thousand basements. Mr. Mosquera personally inspected 49 Loblolly Lane on two occasions. However, another MAW estimator, George Matthews, actually conducted the estimate of 49 Loblolly Lane. Mr. Mosquera testified that he trained Mr. Matthews in basement waterproofing, that Mr. Matthews has been employed by MAW for fifteen years, and that he is certified by MAW as an estimator and installer of basement waterproofing systems.

Mr. D'Aguiar did not qualify Mr. Mosquera as an expert witness. Rather, Mr. Mosquera only testified with respect to MAW policies and procedures, and the meaning of the contents of the D'Aguiar-MAW contract and the various other documents incorporated therein.

Mr. Mosquera testified regarding MAW standard operating procedures followed by MAW estimators while conducting client home estimates. First, the MAW estimator obtains a complete history of the property from the homeowner. Then, the estimator enters the home and looks for water and signs of water. After the estimator identifies the symptoms, he will prepare a "basement field report," and propose a solution.

Mr. Mosquera stated that the basement field report not only identifies the symptoms observed by the estimator, but also assigns "stages" of damage. Mr. Mosquera explained that each "stage" represents a different degree of water damage. Each home inspected is assigned a "stage" between one and four, with one representing very minor damage, and four representing serious damage requiring immediate emergency repairs. A basement in stage one will have a

damp and musty smell; a basement in stage two will also have spotting on the walls; in a stage three basement, water will “seep” through the walls, or there will be flooding during heavy rains; and basements in stage four will have visible cracks in the wall. Each field report identifies all symptoms present in the home, the stage of water damage, and includes an estimate for repair and restorative work if necessary. Once the homeowner approves the estimate, the work begins.

After reviewing Mr. Matthews’ field report (the “Field Report”), Mr. Mosquera testified that Mr. Matthews followed this procedure when he inspected the basement at 49 Loblolly Lane. Mr. Mosquera then explained the contents of the Field Report.²⁹ He explained that Mr. Matthews observed the following issues in the basement of 49 Loblolly Lane: hydrostatic pressure³⁰, capillarity³¹, efflorescence³², wall moisture, cove leaks³³, wall seepage, seam infiltration³⁴, stairway leaks, 1st CB exposure, horizontal buckling two inches deep, mortar cracks that someone improperly attempted to repair, floor cracks, vertical wall cracks, outside cracks, insect infiltration, improper waterproofing, severe wall damage, must, dampness, flooding, mildew, and mold.³⁵ Mr. Mosquera noted that Mr. Matthews wrote on the Field Report that the problem had existed for “years,” and that Mr. Matthews characterized the basement as being in “stage 3” according to MAW internal standards. Moreover, Mr. Mosquera testified that in the Field Report Mr. Matthews plainly stated that the basement needed “[e]mergency service.”

²⁹ Plaintiff’s Exhibit # 1.

³⁰ Mr. Mosquera explained that hydrostatic pressure means that water has accumulated behind the wall such that it puts pressure on the wall.

³¹ Mr. Mosquera explained that capillarity means that water is traveling underground around the basement walls.

³² Efflorescence is a white, chalky by-product of a chemical reaction that takes place in concrete that has been repeatedly exposed to water. This white, chalky substance is visible to the naked eye.

³³ Cove leaks are leaks through cracks in the wall that have formed due to hydrostatic pressure.

³⁴ Seam infiltration is when water leaks into the basement where the basement wall and floor meet.

³⁵ Plaintiff’s Exhibit # 1.

Next, Mr. Mosquera testified regarding the work that was recommended and performed by MAW. First, MAW dug a twelve inch wide trench hugging the basement walls.³⁶ Then, MAW installed a drainage pipe in this trench.³⁷ Next, MAW drilled “bleeder holes” in the wall, so that the water inside and behind the walls could drain out, and to provide an outlet for any future accumulations.³⁸ Also, MAW installed two new crocks to collect existing and any new water, and installed five carbon fiber strips behind the bowed wall to prevent further inward bowing.³⁹ Finally, MAW treated the basement with the following two chemical treatments: (1) demystification to kill any bacteria living in the basement; and (2) a pH neutralizer to slow and prevent damage to the concrete cinder blocks in the basement wall caused by water exposure.⁴⁰ Mr. Mosquera also testified that Mr. D’Aguiar paid the full \$18,967.00 after the work was performed.

On cross-examination, Mr. Mosquera admitted that he is not an engineer or an architect, but rather testified based on experience from on the job training, other training, and seminars. Further, Mr. Mosquera testified that there was a “substantial” amount of rain accumulation in Delaware in March and April of 2007. Mr. Mosquera admitted that there was approximately 8 ½ inches of rain in Delaware in April 2007 alone.

III. Discussion

a. The Heislars’ Liability Under the Complaint

In Delaware, “a seller transferring residential real property shall disclose, in writing, to the buyer...all material defects of that property that are known at the time the property is offered

³⁶ Plaintiff’s Exhibit # 2 at DAG 00123.

³⁷ Plaintiff’s Exhibit # 2 at DAG 00123.

³⁸ Plaintiff’s Exhibit # 2 at DAG 00123.

³⁹ Plaintiff’s Exhibit # 2 at DAG 00123.

⁴⁰ Plaintiff’s Exhibit # 2 at DAG 00123.

for sale or that are known prior to the time of final settlement”⁴¹ It is important to note that oral disclosures, while undoubtedly helpful, do not relieve the seller of residential real estate from their statutory duty to disclose all known material defects in writing.⁴² Moreover, the seller has a continuing duty to update the disclosure form to reflect any material changes up to the date of final settlement.⁴³ This required seller’s disclosure is intended to be a good faith effort by the seller to disclose known defects, and is not a substitute for warranties or inspection.⁴⁴ This requirement was further intended to eliminate the doctrine of “caveat emptor,” or “let the buyer beware” from residential real estate sales in Delaware.⁴⁵ Once the seller’s disclosure form is signed by both the buyer and seller, the form becomes a part of the residential real estate sale contract.⁴⁶ As such, a seller’s failure to disclose known material defects qualifies as a breach of the real estate sale contract by the seller.⁴⁷

In a civil action for breach of contract, the burden of proof is on the plaintiff to prove the claim by a preponderance of the evidence.⁴⁸ To prove a claim for breach of contract by a preponderance of the evidence, the plaintiff must establish the following: (1) the existence of a contract; (2) the defendant breached an obligation imposed by the contract; and (3) resulting damages to the plaintiff.⁴⁹ The Court holds that the Heislars breached their contract with Mr. D’Aguiar.

⁴¹ 6 Del. C. § 2572(a).

⁴² *McCoy v. Cox*, 2007 WL 1677536, *1 (Del. Super. June 4, 2007).

⁴³ 6 Del. C. § 2572(b).

⁴⁴ 6 Del. C. § 2574.

⁴⁵ *Iacono v. Barici*, 2006 WL 3844298, *4 (Del. Super. Dec 29, 2006) (citations omitted).

⁴⁶ *McCoy v. Cox*, 2007 WL 1677536, *1 (Del. Super. June 4, 2007).

⁴⁷ *Id.*

⁴⁸ *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. 2005).

⁴⁹ *VLIW Technology, LLC v. Hewlett-Packard Co. STMicroelectronics, Inc.*, 840 A.2d 606, 612 (Del. 2003).

All the parties here agree that a contract existed between Mr. D’Aguiar and the Heislrs. Section 14 of the Agreement of Sale specifically incorporates the seller’s disclosure form into the agreement.⁵⁰ The parties dispute, however, whether the Heislrs breached the contract by failing to make the required disclosures. Framed more narrowly, the dispositive issue with respect to liability is whether the Heislrs knew that there were material defects in 49 Loblolly Lane and failed to adequately disclose these defects as required by the Buyer Property Protection Act (the “Act”).⁵¹

In *McCoy v. Cox*, the court held that the seller breached the residential real estate sales contract by failing to disclose in the seller’s disclosure form that a ceiling fan was broken, because the seller admitted at trial that he noticed the fan “flickered” about six months before settlement.⁵² Importantly, the Court noted that even if the seller orally disclosed that the fan was broken before settlement, the seller still breached the contract because the Act requires written disclosures.⁵³ Additionally, the court held that a leak in a shower pan known to the sellers before settlement was not a material defect subject to mandatory disclosure because the seller corrected the problem one year before settlement and had not experienced any leaks since the repair.⁵⁴ Finally, the court held that flooding in the garage admittedly known to the sellers five years before settlement was not a material defect subject to mandatory disclosure, because the seller

⁵⁰ Joint Exhibit # 1.

⁵¹ 6 *Del. C.* §§ 2570-78.

⁵² *McCoy v. Cox*, 2007 WL 1677536, *6 (Del. Super. June 4, 2007).

⁵³ *Id.*

⁵⁴ *Id.* at *7. The court also found that the buyers failed to establish by a preponderance of the evidence that the sellers knew the shower pan leaked because the sellers testified consistently that they knew of the problem a year before settlement, and corrected it. Further, the buyers testified that they did not discover the leak until after settlement. In other words, there was no evidence in the record establishing that the sellers knew that the shower pan leaked since they performed the repair one year before settlement.

corrected the problem at the time of the flooding.⁵⁵ The court found that the problem was corrected because the seller testified that the flooding was caused by mud clogging the French drain, that at the time of the flooding he removed the mud, and there had not been any flooding in the garage since this repair.⁵⁶

In this case, the Heislars breached the contract for sale because the facts demonstrate that the Heislars knew, or should have known, of material defects in 49 Loblolly Lane prior to settlement and failed to adequately disclose these defects. On November 22, 2006, the Heislars completed and signed the Seller's Disclosure Form. In this form they disclose the following defects:

- (51) past or present water leakage in the house;
- (53) repairs or other attempts to control the cause or effect of the water leakage;
- (61) that they repaired or attempted to control water or dampness in the basement; and
- (63) cracks or bulges in the floor or foundation walls.⁵⁷

The Heislars provided an inadequate explanation relating to these disclosures as required by the Seller's Disclosure Form. This explanation simply stated: "rerouted down spout at front house near garage... [and] small cracks in basement walls."⁵⁸ The Seller's Disclosure Form also contained the following non-disclosures:

- (38) no drainage or flood problems affecting the property;
- (47) no problems with walls or foundations; and
- (60) no water leakage, accumulation, or dampness in the basement.⁵⁹

⁵⁵ *Id.* at *8.

⁵⁶ *Id.*

⁵⁷ Joint Exhibit # 1.

⁵⁸ Joint Exhibit # 1.

⁵⁹ Joint Exhibit # 1.

The evidence adduced at trial, and relied upon by the fact finder, demonstrates that the Heislars should have made disclosures on each of those line items in the Seller Disclosure Form.

As a preliminary matter, the responses with respect to the cracks in the basement walls were facially inconsistent and misleading. The Heislars disclosed that there were small cracks in the basement walls, but also answered that there were no problems with the walls or foundation. The Heislars should have answered question 47 in the affirmative in order to adequately disclose the cracks in the basement walls.

The disclosures with respect to water issues in the basement, while slightly unclear, can be reconciled. The Heislars disclosed that there was past or present leakage, dampness, or accumulation in the basement that they attempted to control or repair by re-routing the down spout away from the home, but then deny any drainage or flooding issues affecting the property; The Heislars also deny that there is water leakage, dampness, or accumulation in the basement. The disclosures with respect to water issues in the basement can only reasonably be read as disclosing that there was once a water problem in the basement, the Heislars corrected this problem by re-routing the down spout, and as a result the basement was dry at the time the Heislars completed the Sellers Disclosure Form. In other words, the Seller Disclosure Form represents that to the best of the Heislars knowledge, at the time the form was completed, there were no water problems in the basement of 49 Loblolly Lane.

However, the testimony taken at trial establishes by a preponderance of the evidence that the Heislars did know that there was a water problem in the basement at the time they completed the Seller's Disclosure Form. Mr. and Mrs. Heisler both testified at trial that there were water issues in the basement after they bought the home in 1997. They testified that Mr. Heisler corrected the issue by moving the downspout. They also testified that the basement flooded

during a hurricane sometime around the year 2000. Both of these water problems were covered by the disclosures made by the Heislars in the Seller's Disclosure Form.

Mr. Heisler then gave substantial testimony on direct and cross examination establishing that there were water issues in the basement after 2000. Mr. Heisler admitted that he knew that water "seeped" through the walls before settlement and failed to include this in the Seller's Disclosure Form. Mr. Heisler testified that water seeping through concrete basement walls was "normal." After review of the photographs taken shortly after settlement and considering Mr. Mosquera's testimony concerning the work performed on 49 Loblolly Lane and the extent of the damage, the Court finds that the water seepage through the walls constitutes a known material defect, rather than a normal non-material problem common in residential basements.

Moreover, Mr. Heisler admitted that he knew about the bulge in the basement wall before settlement, but that his required explanation to question 62 only addressed small cracks in the basement wall. There was significant dispute between Mr. Heisler, Mr. D'Aguiar, and Mr. Vickery regarding the timeline, what happened, and what was said during Mr. D'Aguiar's first visit to the home, and his second visit for Mr. Vickery's home inspection. Even assuming, *arguendo* that the Court finds Mr. Heisler orally disclosed that there was a bulge or bow in one of the basement walls, *the Act requires written disclosures*.⁶⁰ Further, Mr. Mosquera testified that Mr. Matthews concluded the bulge was caused by water accumulation behind the wall, and required a significant amount of work to repair, including the installation of five carbon fiber supporting strips behind the wall. Therefore, not only was the bulge known to the Heislars before settlement, but it was a material defect that required a substantial amount of work to repair.

⁶⁰ *McCoy v. Cox*, 2007 WL 1677536, *1 (Del. Super. June 4, 2007).

Further, the disclosure indicating that there were cracks in the basement wall was insufficient. The Field Report details mortar cracks with attempted repair, horizontal buckling, floor cracks, vertical wall cracks, outside cracks, improper waterproofing and indicated that the problem had developed over “years.” The Act did not require Mr. Heisler to provide a description including technical terms only used by basement waterproofing and restoration specialists. However, when viewed with Mr. Matthews report and the photographs of the bulge, numerous cracks, discoloration, and attempted repair, it is clear that “small cracks” was not sufficient to explain the gravity of this particular defect disclosed in response to question 62.

b. Damages

1. D’Aguiar v. The Heislrs

The Court finds and holds that Mr. D’Aguiar met his burden to establish that he suffered damages as a result of the Heislrs’ breach in the amount of \$18,967. The Court admitted into evidence Plaintiff’s Exhibits # 1 and 2, which contain the MAW estimate for the repairs needed at 49 Loblolly Lane, and detailed descriptions of the damage to the basement and the proposed repairs. Mr. Mosquera and Mr. D’Aguiar testified that those repairs were performed and that Mr. D’Aguiar paid MAW \$18,967.00 for this work.

Also, Mr. D’Aguiar requests that the Court award consequential damages attributable to any loss in resale value caused by the Heislrs’ failure to make disclosures. However, the Court finds and holds that Mr. D’Aguiar failed to meet his burden to establish these damages by a preponderance of the evidence. Mr. D’Aguiar failed to proffer an expert in valuation of residential real estate, or any documentary evidence such as an appraisal report, that would support a claim for consequential damages here. Therefore, damages are limited to the \$18,967.00 that Mr. D’Aguiar established by a preponderance of the evidence.

2. D'Aguiar v. BHI

The Court has previously entered judgment as to liability in favor of Mr. D'Aguiar and against BHI. The only questions remaining are whether Mr. D'Aguiar is entitled to any damages and, if so, in what amount.

The Home Inspection Contract contains a limitation of liability clause. The clause provides: “[t]he client agrees to limit any claim of liability for personal injury or property damage caused by any negligence of the Company or its agents to two times the amount of the original inspection fee.”⁶¹ The total inspection fee was \$405.00.⁶² If the clause is applicable to Mr. D'Aguiar's claim against BHI, damages will be limited to \$810.00. Mr. D'Aguiar argues that the clause does not apply to breach of contract actions, and if it does, the clause is unenforceable because it is unconscionable. For the following reasons, the Court finds that this limitation of liability clause applies and is not unconscionable. Therefore, the BHI is only liable for damages in the amount of \$810.00.

Liquidated damages clauses and clauses limiting liability are enforceable in Delaware when damages are uncertain and the amount agreed upon is reasonable.⁶³ However, if the amount of damages is easily ascertainable or the amount fixed is either excessive or grossly inadequate, then the clause is void.⁶⁴

The Court has not been able to find any published decisions addressing limitation of liability provisions in home inspection contracts; however, other State courts have addressed the issue and are helpful here. In *Head v. US INSPECT DFW, Inc.*, the Court of Appeals of Texas upheld a clause limiting a home inspector's liability for all causes of action arising out of a home

⁶¹ Joint Exhibit # 3 at DAG0081.

⁶² Joint Exhibit # 3 at DAG0081.

⁶³ *Donegal Mut. Ins. Co. v. Tri-Plex Sec. Alarm. Sys.*, 622 A.2d 1086, 1089 (Del. Super. 1992).

⁶⁴ *Id.*

inspection contract to the fee paid for the inspection, not to exceed \$500.00.⁶⁵ The cost of the home inspection in that case was \$348.27.⁶⁶ The Court upheld the clause because it was conspicuously set apart in the agreement, was separately initialed, other home inspection companies were available, and the plaintiff in that case was represented by counsel during the sale.⁶⁷ Moreover, the court explained:

[t]here are also legitimate commercial reasons for allowing [the parties] to limit their liability. In finding policy reasons for upholding such clauses, courts examining them in the context of burglar and fire alarm systems have noted that in those situations, the customer pays a small fee, and prohibiting the limitation of liability could expose the alarm company to significant risks that could vary widely depending on the contents of the building...[t]he situation here is analogous. Head paid a small fee for a visual inspection of her home, and prohibiting Affordable from limiting liability could subject it to significant risk of liability. Furthermore, without the ability to limit liability, the costs of home inspection services would likely increase, which might make this service unaffordable for some...[t]herefore, the policy reasons in favor of limiting liability in the alarm context apply equally as well in this situation.⁶⁸

The Court agrees with this policy argument. While Mr. D'Aguiar was not represented by counsel and the limitation of liability clause here did not require that he separately initial, the clause was conspicuously present and there are other home inspection companies besides BHI that were available. When Mr. D'Aguiar contracted for the home inspection, he contracted to receive a home inspection that would discover all material defects in the home, not an agreement for purchase of an insurance policy. Given the myriad of problems often discovered or not discovered by home inspectors and their wildly varying costs of repair, BHI would have charged Mr. D'Aguiar substantially more than \$405.00 for the pre-sale home inspection of a \$315,000.00 home had it expected that its liability was not limited by the contract. Therefore, the limitation of

⁶⁵ *Head v. US INSPECT DFW, Inc.*, 159 S.W.3d 731, 747-49 (Tex. App. 2005).

⁶⁶ *Id.* at 747.

⁶⁷ *Id.* at 748.

⁶⁸ *Id.* at 748-49.

liability clause in the BHI contract is enforceable because damages were uncertain and the amount agreed upon was reasonable, and the damages collectable against BHI are \$810.00.

IV. Conclusion

For the reasons stated above, the Court finds for the plaintiff on the Complaint against the Heislars and awards plaintiff damages in the amount of \$18,967.00 plus court costs and pre-judgment and post-judgment interest at the legal rate until satisfied. Further, the Court awards Mr. D'Aguiar damages against BHI in the amount of \$810.00 plus court costs and pre judgment interest and post judgment interest at the legal rate until satisfied.

IT IS SO ORDERED this 15th day of December, 2011.

Eric M. Davis

Eric M. Davis,
Judge